

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER DAVIDSON,

Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,
et al.,

Defendants.

No. C 14-1783 PJH

**ORDER GRANTING MOTION
TO DISMISS**

Defendants' motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing the first amended complaint came on for hearing on November 12, 2014. Plaintiff appeared by her counsel Adam Gutride, and defendants appeared by their counsel Amy Lally. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion as follows.

BACKGROUND

Plaintiff Jennifer Davidson alleges that defendants Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc.; and Kimberly-Clark Global Sales LLC ("Kimberly-Clark" or "defendants") falsely advertised that four cleansing cloths/"wipes" they manufacture and sell are "flushable." First Amended Complaint ("FAC") ¶¶ 17, 19-25, 31-38. The four products at issue are Kleenex® Cottonelle® Fresh Care Flushable Wipes & Cleansing Cloths, Scott Naturals® Flushable Moist Wipes, Huggies® Pull-Ups® Flushable Moist Wipes, and U by Kotex® Refresh flushable wipes. FAC ¶ 17.

Plaintiff asserts that "[r]easonable consumers understand the word 'flushable' to mean suitable for disposal down a toilet." FAC ¶ 18. Plaintiff asserts that the four

1 Kimberly-Clark products are not in fact "flushable" under that definition. Id. She believes
2 that after the wipes are flushed down a toilet, they fail to "disperse," with the result that they
3 may clog municipal sewer systems and septic systems, and/or damage pipes and sewage
4 pumps. See FAC ¶¶ 18, 39. Indeed, she claims that the defendants' flushable wipes are
5 designed so as to "not break down easily when submersed in water." FAC ¶ 40.

6 At some point in 2013, plaintiff purchased one of the products at issue – Scott
7 Naturals® Flushable Moist Wipes (also referred to as Scott Naturals® Flushable Cleansing
8 Cloths) – which at the time she believed had been "specially designed to be suitable for
9 flushing down toilets . . . [without] caus[ing] problems in her plumbing or at the water
10 treatment plant." FAC ¶ 52.

11 She does not allege that her use of the wipes caused plumbing problems. Instead,
12 she simply asserts that after "several uses of the wipes," she "began to become concerned
13 that they were not truly flushable, [and] so stopped flushing the wipes and stopped using
14 the product altogether." FAC ¶ 53. She has not purchased any of defendants' "flushable"
15 products since that time, FAC ¶ 55 (and indeed bought the Scott Naturals® product on only
16 the one occasion "[i]n 2013").

17 Plaintiff asserts that she would not have purchased the Scott Naturals® wipes had
18 defendants not misrepresented "the true nature" of their "flushable" products – or, at a
19 minimum, would have paid less for the Scott Naturals® product because she would not
20 have obtained the benefit of being able to flush it, FAC ¶ 56 (even though she did flush it).

21 Plaintiff filed the original complaint in this case on March 13, 2014 in the Superior
22 Court of California, County of San Francisco, as a proposed class action. Plaintiff asserts
23 violations of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.,
24 and the False Advertising Act ("FAL"), Cal. Bus. & Prof. Code § 17500, et seq.; common
25 law fraud, deceit and/or misrepresentation; and unlawful, unfair, and deceptive trade
26 practices, in violation of Cal. Bus. & Prof. Code § 17200, et seq. ("UCL").

27 Plaintiff claims that the four products at issue are deceptively advertised as
28 "flushable," FAC ¶¶ 35-38; that they are all manufactured "using the same proprietary

1 paper blend, for which [d]efendants own the patent," FAC ¶ 40; and that they were all
2 subjected to the same "flawed" tests used for setting the "guidelines" for determining
3 whether a product is "flushable," FAC ¶¶ 41-47. She asserts that wipes that are not truly
4 "flushable" are the cause of numerous problems at municipal sewage treatment facilities.
5 FAC ¶¶ 48-51.

6 Defendants removed the case on April 17, 2014, asserting jurisdiction under the
7 Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). They subsequently moved to
8 dismiss the complaint and strike certain allegations in the complaint. On August 8, 2014,
9 the court issued an order granting the motion in part and denying it in part.

10 The court denied the motion to dismiss the statutory UCL/FAL/CLRA causes of
11 action for lack of subject matter jurisdiction (failure to allege Article III and statutory
12 standing), with the exception of the claim for prospective injunctive relief, for which the
13 court found plaintiff had no standing.

14 The court granted the motion to dismiss the statutory claims for failure to allege
15 fraud with particularity as to affirmative misrepresentations, with leave to amend, to plead
16 facts showing that defendants made false statements, and that she relied on the alleged
17 misrepresentations. The court denied the motion to dismiss the statutory claims for failure
18 to state a claim of fraudulent omissions, finding that it was unclear whether plaintiff's claim
19 was that the alleged omission of information explaining the meaning of "flushable" was
20 actionable because it was contrary to an affirmative representation made by defendants, or
21 that it was actionable because defendants had a duty to disclose to her (and/or the public)
22 that the wipes might not completely disperse by the time they arrived at the wastewater
23 treatment plant.

24 The court granted the motion to strike as irrelevant the allegations regarding
25 sewage/septic systems and municipal wastewater treatment plants in locations other than
26 the city where plaintiff lives (San Francisco, California). The court denied the motion to
27 strike allegations regarding products plaintiff did not purchase and advertising she did not
28 view, on the ground that those allegations might possibly be relevant to the question

whether plaintiff can assert UCL/FAL/CLRA claims on behalf of a proposed class as to such products or advertising.

Plaintiff filed the FAC on September 5, 2014, alleging the same four causes of action as in the original complaint. Under the CLRA claim, plaintiff seeks restitution, injunctive relief, actual damages, punitive damages, and statutory damages, on her behalf and on behalf of the other members of the proposed class. Under the UCL/FAL claims, plaintiff seeks restitution and injunctive relief, on her own behalf and on behalf of the other members of the proposed class. Under the fraud claim, plaintiff seeks compensatory damages and punitive damages, on her own behalf and on behalf of the other members of the proposed class. On all four causes of action, plaintiff seeks on her own behalf and on behalf of the other members of the proposed class "and the general public," attorney's fees under the CLRA and California Code of Civil Procedure § 1021.5, plus costs of suit.

Defendants now seek an order dismissing the FAC for lack of subject matter jurisdiction and failure to state a claim, and striking certain allegations in the FAC.

DISCUSSION

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Legal standard

Federal courts can adjudicate only those cases which the Constitution and Congress authorize them to adjudicate – those involving diversity of citizenship or a federal question, or those to which the United States is a party. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380-81 (1994). The court is under a continuing obligation to ensure that it has subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff always bears the burden of establishing subject matter jurisdiction. Kokkonen, 511 U.S. at 377.

Standing is “an essential and unchanging part of the case-or-controversy requirement of Article III” of the United States Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To establish a “case or controversy” within the meaning of

Article III, a plaintiff must, at an "irreducible minimum," show an "injury in fact" which is concrete and not conjectural, as well as actual or imminent; a causal causation between the injury and defendant's conduct or omissions; and a likelihood that the injury will be redressed by a favorable decision. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010); Lujan, 504 U.S. at 560-61. Standing is not subject to waiver, and must be considered by the court even if the parties fail to raise it. See United States v. Hays, 515 U.S. 737, 742 (1995).

2. Defendants' Motion

In the prior order, the court found that plaintiff lacked standing to seek prospective injunctive relief because she failed to allege facts showing she intended to purchase the product at issue in the future – and more importantly, actually indicated that she would not purchase any of defendants' "flushable" products in the future. Aug. 8, 2014 Order, at 6-9. Although the court did not specify that the dismissal of the claims for prospective injunctive relief was with prejudice, it seemed clear to the court that any amendment would be futile. Nevertheless, the FAC again seeks prospective injunctive relief. Defendants argue that the court should dismiss the injunctive relief claims for the same reason as stated in the prior order.

The court finds that the FAC fails to allege sufficient facts to show standing to seek injunctive relief. In a new section of the FAC, plaintiff alleges that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet" and that she "would purchase truly flushable wipes manufactured by [d]efendants if it were possible to determine prior to purchase if the wipes were suitable to be flushed." See FAC ¶ 57. She claims that she "regularly visits stores such as Safeway," where defendants' "flushable" wipes are sold, but has been "unable to determine the flushability of the wipes on the shelves." Id. She "knows that the design and construction of the [f]lushable [w]ipes may change over time, as [d]efendants use different technology or respond to pressure from legislatures, government agencies, competitors, or environmental organizations," but as long as defendants use "flushable" to describe wipes that are not in her opinion, flushable,

1 she will continue to have no way of knowing whether the representation "flushable" is true
2 or not. Id.

3 Based on these "new" allegations, plaintiff asserts in her opposition to the motion
4 that as long as defendants continue to deny her accurate information about products she
5 wishes to purchase, the ongoing "injury in fact" is sufficient to confer standing. Plaintiff
6 contends that even if she does not have statutory standing because she has not alleged a
7 likelihood of future loss of money or property, she has adequately alleged Article III
8 standing based on a continuing constitutional "injury in fact" based on a "credible threat that
9 defendants' ongoing violations of California's consumer protection laws" will cause her
10 injury.

11 Plaintiff claims that courts in this district have granted injunctive relief "in identical
12 circumstances." In support, she cites three "food" cases – Ries v. Arizona Beverages USA
13 LLC, 287 F.R.D. 523, 533 (N.D. Cal. 2012); Henderson v. Gruma Corp., 2011 WL 1362188
14 at *8 (C.D. Cal. Apr. 11, 2011); and Brazil v. Dole Packaged Foods, LLC., 2014 WL
15 2466559 (N.D. Cal. May 30, 2014). She does not explain, however, how those cases are
16 "identical" to the present case.

17 The court finds that the motion must be GRANTED. As stated in the prior order,
18 plaintiff lacks standing to assert a claim for prospective injunctive relief, as she has
19 indicated she has no intention of purchasing the same Kimberley-Clark product in the
20 future. Thus, leave to amend would be futile. Plaintiff alleges that the product at issue is
21 not "flushable," and that she wishes to purchase a product that is truly "flushable." Given
22 that she has concluded that the "flushable" wipes at issue in this case are not truly
23 "flushable," any such product that she would be willing to purchase would necessarily be a
24 product with a different design and construction, not the product at issue here. See FAC ¶¶
25 53, 54, 57. Just as the court found with regard to the original complaint, plaintiff wants to
26 purchase different wipes, not the same wipes again.

27 Moreover, the threat of future harm alleged in the FAC is that Kimberly-Clark
28 might redesign its product in the future, and that plaintiff might not know that the product

has been redesigned to be more "flushable," and that she might not purchase it. See FAC ¶ 57. This is exactly the type of conjectural or hypothetical injury for which a plaintiff does not have standing. See, e.g., Mayfield v. U.S., 599 F.3d 964, 970 (9th Cir. 2010); Profant v. Have Trunk Will Travel, 2011 WL 6034370 at *5 (C.D. Cal. Nov. 29, 2011).

Unlike the plaintiffs in the cases cited by plaintiff in her opposition, plaintiff is not likely to purchase the Scott Wipes if the "flushable" label is simply removed, given that she stopped using the wipes after she made the determination that they were not "flushable." The allegations in the FAC make clear that plaintiff does not want a non-"flushable" wipe, and that she would not have purchased the Scott wipes had she known they were not "flushable" under her definition. Thus, even if Kimberly-Clark removed the "flushable" label and even if it charged less for the product, plaintiff would still not buy it because she believes it is not flushable.

Courts have found in Ries and other "food" cases that the product might still be purchased by the plaintiff if properly labeled. However, where a plaintiff has no intention of purchasing the product in the future, a majority of district courts have held that the plaintiff has no standing to seek prospective injunctive relief, and some have also held that a plaintiff who is aware of allegedly misleading advertising has no standing to seek prospective injunctive relief. See, e.g., Rahman v. Mott's LLP, 2014 WL 5282106 at *5-6 N.D. Cal. Oct. 15, 2014 (discussing issue and citing cases); In re ConAgra Foods, Inc., ___ F.R.D. ___, 2014 WL 4104405 at * 27-29 (C.D. Cal. Aug. 1, 2014) (same, in context of motion to certify Rule 23(b)(2) class).

In addition, in cases such as this one, involving claims that a product does not work or perform as advertised, where the plaintiff clearly will not purchase the product again, courts have found no risk of future harm and no basis for prospective injunctive relief. See, e.g., Delarosa v. Boiron, 2012 WL 8716658 at *5 (C.D. Cal. Dec. 28, 2012) (advertising for homeopathic medication was false because product did not perform as advertised, but plaintiffs would not buy product in future because in their view it did not work); Castignola v. Hewlett Packard Co., 2012 WL 2159385 at *5 (N.D. Cal. June 13, 2012) (consumers

1 signed up on website for "membership" with monthly fees for service they thought was free
2 had no standing to seek injunctive relief where they did not want to be signed up for the
3 paid service and had no intention to continue with it).

4 Here, plaintiff wants to purchase only those wipes that she has determined to be
5 "flushable," and since she has determined that the Scott Wipes are not "flushable" under
6 her definition, she will not purchase them. Were Kimberly-Clark to redesign the product to
7 satisfy plaintiff's definition of "flushable," it would not be the same product (unlike a food
8 product where the "all natural" label is removed, or even where, e.g., high fructose corn
9 syrup is replaced by sugar but the product remains essentially the same). Here, if plaintiff's
10 allegations are accepted as true, the design of the Kimberly-Clark products at issue
11 precludes any of them from being considered "flushable" (under plaintiff's definition), and
12 she will therefore not purchase the wipes. Thus, plaintiff lacks standing to seek prospective
13 injunctive relief as to the products at issue.

14 B. Motion to Dismiss for Failure to State a Claim

15 1. Legal Standard

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal
17 sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191,
18 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom
19 Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). Federal
20 Rule of Civil Procedure 8 requires that a complaint include a "short and plain statement of
21 the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

22 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
23 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support
24 a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). While
25 the court is to accept as true all the factual allegations in the complaint, legally conclusory
26 statements, not supported by actual factual allegations, need not be accepted. Ashcroft v.
27 Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis. Sec. Litig., 536 F.3d 1049,
28 1055 (9th Cir. 2008).

The allegations in the complaint "must be enough to raise a right to relief above the speculative level," and a motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’" Id. at 679. In the event dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. See Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

Although the court generally may not consider material outside the pleadings when resolving a motion to dismiss for failure to state a claim, the court may consider matters that are properly the subject of judicial notice. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). Additionally, the court may consider exhibits attached to the complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), as well as documents referenced extensively in the complaint and documents that form the basis of a the plaintiff's claims. See No. 84 Employer-Teamster Jt. Counsel Pension Tr. Fund v. America West Holding Corp., 320 F.3d 920, 925 n.2 (9th Cir. 2003).

Finally, in actions alleging fraud, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b); Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) ("Under Rule 9(b), falsity must be pled with specificity, including an account of the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.""). The plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made. Yourish v. California

1 Amplifier, 191 F.3d 983, 992–93 (9th Cir. 1999). “[A]llegations of fraud must be specific
2 enough to give defendants notice of the particular misconduct which is alleged to constitute
3 the fraud charged “so that they can defend against the charge and not just deny that they
4 have done anything wrong.” Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir.
5 2010) (citation and quotation omitted).

6 2. Defendants' motion

7 In the order regarding the motion to dismiss the original complaint, the court
8 dismissed the UCL/FAL and CLRA causes of action, finding that plaintiff had failed to allege
9 facts showing reliance on any alleged misrepresentations. The court found that plaintiff did
10 not allege in the complaint that she had seen any of defendants' advertisements or
11 websites – let alone that she relied on any of them in deciding to make her purchase. The
12 court found that plaintiff had alleged only that she based her decision to purchase the Scott
13 Naturals® wipes on the representation on the package that they were “flushable.”

14 In addition, the court noted, plaintiff alleged no facts showing how she came to
15 believe that the Scott product was not “flushable.” She did not allege that she herself
16 experienced any problems flushing the product down the toilet, or that the product caused
17 any blockage or clogging in her pipes. She asserted only that after several uses of the
18 wipes she “began to seriously doubt that they were truly flushable.”

19 In the present motion, defendants again argue that the complaint should be
20 dismissed under Rule 9(b) for failure to allege fraud with particularity, and that the dismissal
21 should be with prejudice because the FAC includes the same deficiencies as the original
22 complaint. Defendants assert that the FAC does not sufficiently plead that the challenged
23 representation – that the wipes were “flushable” – was false. They also contend that
24 because the FAC fails to allege sufficient facts showing that Kimberly-Clark's specific
25 products (as opposed to other products) are not suitable for flushing in municipal sewer
26 systems (like plaintiff's), her economic damages theory fails.

27 Finally, defendants assert that the FAC fails to state a claim based on alleged
28 fraudulent omissions. In order to state a claim of fraudulent omissions under the UCL/FAL,

1 CLRA, or as a claim of common law fraud, a plaintiff must allege facts either showing that
2 the alleged omissions are "contrary to a representation actually made by the defendant, or
3 showing an omission of a fact the defendant was obliged to disclose." Daugherty v. Am.
4 Honda Motor Co., Inc., 144 Cal. App. 4th 824, 835 (2006); see also Lovejoy v. AT&T Corp.,
5 92 Cal. App. 4th 85, 96 (2001).

6 In the FAC, plaintiff amended her allegation to include the following basis for the
7 fraudulent omissions claim:

8 If [d]efendants informed consumers that the Flushable Wipes were not
9 suitable for flushing down a toilet, and that doing so created a substantial risk
10 that the consumers would clog or damage their household plumbing, or clog,
11 damage and increase the costs of municipal sewage treatment systems
(which they bear as taxpayer and ratepayers), they would not pay the
premium, but rather, would opt to purchase the cheaper items not labeled
"flushable."

12 FAC ¶ 30.

13 Defendants argue that, assuming that "flushable" is (as plaintiffs argue) reasonably
14 defined as meaning "suitable for flushing down a toilet," the FAC clarifies that the fraudulent
15 omissions claim is premised on defendants' alleged omission of "facts" contrary to the
16 "flushable" representation, specifically the "fact" that flushing the wipes "created a
17 substantial risk that consumers would clog or damage their household plumbing, or clog,
18 damage and increase the costs of municipal sewage treatment systems (which they bear
19 as taxpayer and ratepayers)" as alleged in FAC ¶ 30.

20 Defendants contend, therefore, that in order to survive a motion to dismiss under
21 Rule 12(b)(6) and Rule 9, the FAC must allege facts to support the conclusion that
22 Kimberly-Clark's wipes "created a substantial risk that the consumers would clog or
23 damage their household plumbing, or clog, damage and increase the costs of municipal
24 sewage treatment systems." Here, defendants argue, plaintiff has alleged no facts to
25 support this conclusion as to the specific products manufactured by Kimberly-Clark, and it
26 would not be reasonable for the court to infer any facts to support this conclusion in light of
27 judicially noticeable facts to the contrary (citing a statement by a municipal sewer authority
28 in New Jersey, which they have attached to their Request for Judicial Notice ("RJN"), that

1 Kimberly-Clark's "flushable" wipes were the only ones that passed the authority's test of
2 dispersability).

3 In opposition, plaintiff asserts that the FAC pleads facts sufficient to state a claim for
4 violations of the UCL/FAL and CLRA, and a claim for common law fraud. Plaintiff argues
5 that the FAC specifically pleads that she viewed the package for Scott Naturals® wipes in a
6 San Francisco Safeway in 2013, where she read, and relied upon, the word "flushable" and
7 noticed that the Scott wipes were more expensive than the wipes that were not labeled
8 "flushable;" and that on the basis of that "misrepresentation," she was led to believe that
9 the product was suitable for disposal down a household toilet, when it was not. She
10 asserts that her claims and injuries are premised on her reliance on the single word
11 "flushable" on the Scott Naturals® product packaging (as detailed in FAC ¶ 52) and not on
12 any other representations alleged in the FAC.

13 With regard to defendants' assertion that the FAC fails to allege facts showing that
14 the claim that defendants' wipes were "flushable" was false, plaintiff cites to allegations
15 regarding three U.S. cities and "many other consumers" who found defendants' wipes to be
16 unsuitable for flushing because they clogged household plumbing and municipal treatment
17 systems (citing FAC ¶¶ 49-51, 58). She also points to allegations explaining that proper
18 and immediate dispersing is an essential element of a material's suitability for flushing
19 (citing FAC ¶ 34); describing the "special proprietary paper" used by defendants to
20 manufacture their wipes, which paper is designed to sit in a wet environment for months
21 without breaking apart, and which therefore cannot disperse efficiently when flushed down
22 a toilet (citing FAC ¶ 40); referring to videos on defendants' websites showing that the
23 wipes take hours to disperse (citing FAC ¶ 44¹); and asserting that plaintiff herself observed
24 that defendants' wipes did not "disperse properly" in the toilet prior to being flushed (citing
25 FAC ¶ 53).

26
27 ¹ The referenced Kimberly-Clark website distinguishes between wipes that should not
28 be flushed and wipes that can be flushed. The videos claim that defendants' flushable wipes
"break apart with minimum agitation in just under two hours."

1 Plaintiff also cites to defendants' alleged use of a "flawed technology" – a
2 "flushability test" that she claims does not really measure whether the wipes are suitable for
3 flushing (citing FAC ¶¶ 41-47). She contends that the test – which was developed by the
4 Association of Nonwoven Fabrics Industry – does not mimic real-world conditions because
5 the water in the tests is agitated more strongly than is the water at the wastewater
6 treatment plants; because the tests fail to take into account the wipes' propensity for
7 "ragging" or becoming tangled with one another; and because the tests assume that wipes
8 will take significant time to reach wastewater treatment plant, whereas in plaintiff's view the
9 journey may take only "a few minutes."

10 Finally, plaintiff argues that her omission-based claims are properly pled. She
11 agrees with defendants' position that the new allegations in the FAC clarify that she is
12 proceeding solely under the theory that the alleged omission was contrary to a
13 representation made by the defendants – that their wipes are "flushable." She asserts that
14 as pled in the FAC, there is only one proper definition of the word "flushable" – i.e.,
15 "suitable for disposal by flushing down a toilet" (citing FAC ¶¶ 31-35).

16 Plaintiff concedes that the representation that the wipes were "flushable" might be
17 true if the word were defined as meaning "capable of being flushed," but she argues that
18 the use of this word would still be misleading to a reasonable consumer because that
19 consumer might understand the word to mean "suitable for being flushed." She claims that
20 the wipes are not (in her view) "suitable for being flushed" because of the risk of damage to
21 household plumbing and municipal wastewater treatment systems. She asserts that it was
22 a material omission "to fail to tell her how [d]efendants were defining 'flushable' and that the
23 wipes were not actually suitable for disposal via toilet because of the risk of damage to
24 household plumbing and municipal sewage treatment systems."

25 The court finds that defendants' motion must be GRANTED. Plaintiff has failed to
26 correct the deficiencies of the original complaint, and the FAC is also deficient in other
27 ways identified by defendants. Assuming for the sake of argument that plaintiff has
28 adequately pled that she relied on the single word "flushable" on the product packaging for

1 the Scott Naturals® wipes that she purchased, the court finds that she has still not alleged
2 facts showing that the representation "flushable" is false or misleading as to the Scott
3 Naturals® product or as to any of the other three Kimberly-Clark products at issue. It is not
4 enough for her to simply claim that it is false – she must allege facts showing why it is false.
5 See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) ("The plaintiff
6 must set forth what is false or misleading about a statement, and why it is false.").

7 Having personally experienced no problems with her plumbing on account of her use
8 of the Scott Naturals® wipes or any of the products at issue, plaintiff must point to some
9 other specific facts showing that the designation "flushable" is false. Plaintiff has failed to
10 do this. She cites to articles on the Internet that discuss problems with clogs and
11 blockages at wastewater treatment plants in various locations in the United States, but
12 those problems appear to have had a number of causes – including people flushing "non-
13 flushable" wipes or other "non-flushable" materials down the toilet.

14 Plaintiff asserts that "[m]unicipalities all over the country have experienced
15 numerous problems that have been tied specifically to [d]efendants' [f]lushable [w]ipes."
16 FAC ¶ 48. She bases this allegation on television news reports originating in three local
17 news markets – Bakersfield CA, Jacksonville FL, and San Antonio TX (though not San
18 Francisco, the city where plaintiff lives) – in which the reporters opined that "flushable"
19 wipes, including those manufactured by Kimberly-Clark and numerous other companies,
20 have caused clogs and blockages in residential plumbing systems and at local sewage
21 treatment plants. See FAC ¶¶ 49-51.

22 However, the FAC also cites news articles stating that problems at municipal
23 wastewater treatment plants are caused by consumers who dispose of non-flushable wipes
24 (and other objects not intended to be flushed, such as diapers, rags, towels, hair, cigarette
25 butts, kitty litter, and doggy waste bags) into sewer systems. See FAC ¶ 34. In addition,
26 the FAC acknowledges that issues involving wipes at wastewater treatment plants are
27 caused by wipes interacting with non-flushable items (such as debris) in the water
28 treatment system. See FAC ¶¶ 18, 46.

1 Plaintiff also bases the allegation of falsity on statements by "consumers" who
2 allegedly posted complaints on a Cottonelle® website (which currently cannot be
3 accessed). The comments as quoted by plaintiff are vague and lacking in detail, and also
4 appear to involve allegations of damage to the consumers' septic systems, not municipal
5 sewer systems. See FAC ¶ 58. These references do not satisfy plaintiff's obligation to
6 plead with specificity how the "flushable" representation was false and caused the damage.
7 The comments do not specify when the consumer used the product and how many times,
8 how the consumer used the product, and the other "who, what, when, where, and how" of
9 the misconduct that must be alleged in the complaint. Without those details, plaintiff's
10 statement that the wipes are not "flushable" is nothing more than an unwarranted
11 conclusion.

12 In short, plaintiff has failed to plead with particularity how Kimberly-Clark's wipes are
13 not flushable. She alleges that she flushed the wipes – thus, the designation "flushable" is
14 literally true – but she does not allege that they caused problems with her plumbing system,
15 or even issues with her sewer system. Such allegations might be relevant to her definition
16 of "flushable" as "suitable for disposal down a toilet," but the references to other people's
17 plumbing issues or to other cities' wastewater treatment systems are not sufficiently
18 detailed to meet the pleading standard. See In re GlenFed Sec. Litig., 42 F.3d 1541, 1548
19 (9th Cir. 1994) (plaintiff required to plead with particularity "why the statement or omission
20 complained of was false or misleading").

21 Plaintiff also criticizes the tests Kimberly-Clark has performed on its "flushable"
22 wipes (documented in videos on its website), claiming that the tests are worthless because
23 they do not mimic what she calls "real-world conditions." Specifically, she claims that the
24 water is agitated more strongly in the tests than at the wastewater treatment plants; that the
25 tests fail to take into account what she asserts is the wipes' propensity for "ragging" or
26 becoming tangled with one another; and that the tests assume that wipes will take
27 significant time to reach the wastewater treatment plant, whereas in plaintiff's view the
28 journey may take only "a few minutes." If anything, plaintiff's discussion of the tests

1 Kimberly-Clark conducted on its products underscores the fact that it would be impossible
2 for any factfinder to determine whether the wipes are "flushable" under plaintiff's definition
3 because of the differences and variations among types of wipes, operation of wastewater
4 or septic treatment systems in different locations, and pipes and drainage systems.

5 Plaintiff's failure to plead facts showing why the designation "flushable" is false as
6 applied to the Kimberly-Clark products at issue means that the complaint must be
7 dismissed under Rule 9(b). Id. at 1107-08. She essentially alleges that using the
8 designation "flushable" is false because the wipes are not flushable – in other words,
9 saying that the wipes are "flushable" is false because it is not true. That is simply a circular
10 argument, not an explanation of why the designation is false.

11 As for the fraudulent omissions claim, plaintiff is required to plead facts showing with
12 particularity that the wipes at issue are not suitable for flushing down a toilet because they
13 create a substantial risk that consumers will clog or damage their plumbing, and that
14 defendants failed to disclose that fact. However, the only allegations plaintiff proffers in
15 support of her conclusory claim that Kimberly-Clark's wipes are not "suitable for flushing"
16 are the general allegations noted above – that news reporters in three cities stated that
17 some wipes (not necessarily flushable wipes and not necessarily Kimberly-Clark wipes)
18 have caused clogs or blockages in their local wastewater systems; and that a few
19 purported consumers posted comments on Kimberly-Clark's website saying the wipes
20 clogged their rural plumbing/septic systems (though they provided no details as to what
21 products they purchased, when or how they used them, or how they claim the clogs were
22 caused by Kimberly-Clark's wipes). This is not sufficient to plead the fraudulent omission
23 claim with specificity under Rule 9, and is not even sufficient to meet the pleading
24 requirements of Rule 8.

25 Finally, where – as here – a consumer fails to allege facts showing that he/she
26 experienced any harm resulting from product use, the consumer has failed to allege
27 damage under the UCL/FAL/CLRA or common law fraud. See Herrington v. Johnson &
28 Johnson Consumer Companies, Inc., 2010 WL 3448531 at *8-12 (N.D. Cal. Sept. 1, 2010)

(because the plaintiffs did not allege facts showing that the level of particular chemicals in the defendants' products caused them or their children harm, "under the objective test for materiality, the alleged non-disclosures are not actionable").

CONCLUSION

In accordance with the foregoing, defendants' motion to dismiss is GRANTED. The FAC fails to state a claim for relief that is plausible on its face. Because plaintiff was previously been given leave to amend to correct the deficiencies in the complaint, and failed to do so, the court finds that further leave to amend would be futile. Based on this order, the court finds further that the motion to strike certain allegations in the FAC is moot.

IT IS SO ORDERED.

Dated: December 19, 2014



PHYLLIS J. HAMILTON
United States District Judge